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AHMAD ZIYAD ELIAS & ORS v. SURUHANJAYA SEKURITI MALAYSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
HANIPAH FARIKULLAH J
[JUDICIAL REVIEW NO: WA-25-69-04-2016]
B 15 JULY 2016

ADMINISTRATIVE LAW: *Judicial review – Proceedings – Application for leave to quash decision of Securities Commission Malaysia ('SC') – Whether decision complained of not a decision amenable to judicial review – Whether applicants had* C *locus standi to bring proceedings against SC – Whether applicants had direct financial interest – Whether applicants ought to have resorted to statutory mechanism under s. 364 of Capital Markets and Services Act 2007 – Whether applicants should only seek judicial review after exhaustion of all domestic remedy – Whether application ought to be dismissed*

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The applicants sought, in this proceeding, leave to quash the decision of the first respondent, Securities Commission Malaysia ('SC'). The five applicants were shareholders of Best Oracle Sdn Bhd ('Best Oracle') who owned 20% of the issued and paid up capital of CLIQ Energy Berhad ('CLIQ'), a special purpose acquisition company. On 10 April 2014, CLIQ was listed in Bursa E Malaysia. In accordance with the equity guidelines, CLIQ was required to complete a qualifying asset. CLIQ identified a qualifying asset known as Karazhanbas Northern Field in Kazakhstan ('Kazakhstan asset'). CLIQ appointed for the proposed acquisition of the Kazakstan asset (i) MIB as its principal adviser; (ii) AGR-TRACS ('AGR') as the independent technical F and valuation expert that prepared the Reserve agreement report and asset valuation report ('AR Reports'); and (iii) Deloitte Corporate Advisory Services Sdn Bhd ('Deloitte') to prepare the 'fairness report'. CLIQ through MIB made submissions to SC in respect of the proposed acquisition of the Kazakhstan asset. SC had concerns and sought clarifications from MIB on G various maters, including the technical information and data relied on relating to the Kazakhstan asset. MIB issued a letter dated 7 January 2016 to CLIQ advising them on the steps they should take in regard to their submission on the proposed acquisition of the Kazakhstan asset ('MIB letter'). The applicants contended that the context of the letter revealed that MIB was communicating the instructions of SC to the H applicants whereby MIB specifically advised the Board of Directors of R2 on the specific steps to be undertaken, namely*, inter alia* 'to appoint Deloitte Corporate Advisory to update the fairness report after having reviewed the AGR reports and confirms that nothing has come to its attention and they are satisfied with all information provided to them including assumptions I made in the AGR reports'. The SC raised objection to the applicants' application on grounds that (i) the decision complained of was not a decision

by the SC and hence was not amenable to judicial review; (ii) the applicants had no *locus* to file the application; and (iii) domestic remedy had not been exhausted.

Held (dismissing application):

(1) MIB was the principal adviser of CLIQ and all communication between the applicants and SC were made through MIB in such capacity. Documentary evidence clearly showed that SC did not deal directly with the applicants but communicated at all material times through MIB. SC's instructions and/or queries were carried, at all material times, to the applicants through MIB. (paras 14 & 15)

(2) An email dated 20 January 2016 made it clear that the meaning of 'negative assurance' discussed in the meeting held on 15 January 2016 was a requirement that Deloitte had to undertake an independent technical review of the AGR reports. The independent technical review by Deloitte over the reports of AGR surfaced for the first time in the letter dated 7 January 2016 from MIB, in the form of a query from SC whether Deloitte had undertaken such review. Therefore, there was a 'decision' by SC *vide* MIB's letter for Deloitte to produce an independent technical assessment of AGR's reports. (paras 24 & 25)

(3) The SC's decision has had a severe impact on, *inter alia,* the investments made by the public in R2 and the expectation of the investing public on the acquisition of the qualifying asset and thus the profits to be made and the diminution in the value of shares held by members of the public in R2 due to the return of 90% only of their investment upon liquidation. Thus, the applicants had the *locus standi* to bring this proceedings against SC on the ground that they had a direct financial interest as shareholders of Best Oracle, who in turn held 20% of shares in R2. (paras 30 & 31)

(4) However, the appeal (review) mechanism under s. 364 of the Capital Markets and Services Act 2007 had not been availed by the applicants. The applicants had not provided any reason why it had not resorted to the statutory mechanism under s. 364. The proper time at which the applicants should seek to apply for judicial review was after the exhaustion of the statutory review procedure in pursuant to the said s. 364. (paras 38 & 41)

Case(s) referred to:

Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 805 CA ***(refd)***

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Kerajaan Negeri Selangor & Ors v. Pendaftar Pertubuhan Malaysia & Another Case [2011] 1 LNS 1638 HC ***(refd)***

M & W Zander (M) Sdn Bhd v. Director General of Inland Revenue [2005] 6 CLJ 336 HC ***(refd)***

Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***

Mohd Karim Abas & Ors v. Ketua Pengarah Jabatan Hal Ehwal Kesatuan Sekerja [2013] 1 LNS 280 CA ***(refd)***

R (on the application of Lambeth LBC) v. Secretary of State for Work and Pensions [2005] EWHC 637 ***(refd)***

Semantan Estate (1952) Sdn Bhd v. Collector of Land Revenue Wilayah Persekutuan [1987] 2 CLJ 199; [1987] CLJ (Rep) 329 SC ***(refd)***

Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd [2002] 3 CLJ 624 CA ***(refd)***

Wee Choo Keong v. Ketua Pengarah Perkhidmatan Awam Malaysia [2011] 3 CLJ 331 HC ***(refd)***

Legislation referred to:

Capital Markets and Services Act 2007, ss. 2, 364

Rules of the High Court 1980, O. 53

Securities Commission Malaysia Act 1993, ss. 3, 4

For the applicants - Kamarul Hisham Kamaruddin & Mohd Ruzaini Zulkifli; M/s The Chambers of Kamarul Hisham & Hasnal Rezua

For the 1st respondent - Lambert Rasa-Ratnam, SM Shanmugam, Joanna D'Silva; M/s Lee Hishammuddin Allen & Gledhill

For the 2nd respondent - Wan Hazlin Suraya Wan Sharif; FC

Reported by Suhainah Wahiduddin

JUDGMENT

Hanipah Farikullah J:

Introduction

[1] The applicants sought in this proceeding for leave to quash the decision of the first respondent, Securities Commission of Malaysia (SC) in a letter dated 7 January 2016.

[2] The five applicants are shareholders of Best Oracle Sdn Bhd ("Best Oracle"). Best Oracle owns 20% of the issued and paid-up capital of CLIQ Energy Berhad ("CLIQ"). CLIQ is a special purpose acquisition company. The applicants claimed that they are the management team of CLIQ.

The Applicants' Case

[3] The applicants' case are as follows:

(a) On 10 April 2013, CLIQ was listed on Bursa Malaysia. In accordance with the equity guidelines, CLIQ was therefore required to complete a qualifying asset by 9 April 2016.

(b) In or around February 2015, CLIQ identified a qualifying asset known as Karazhanbas Northern Field in Kazakhstan ("Kazakhstan asset").

(c) CLIQ appointed for the proposed acquisition of the Kazakhstan asset:

(i) MIB as its principal advisor.

(ii) AGR-TRACS ("AGR") as the independent technical and valuation expert. AGR prepared the reserve agreement report and the asset valuation report ("AGR reports").

(iii) Deloitte Corporate Advisory Services Sdn Bhd ("Deloitte") to prepare the "fairness report" pursuant to the Bursa Securities Main Market Listing Requirements.

(d) CLIQ through MIB made two submissions to the Commission in respect of the proposed acquisition of the Kazakhstan asset.

The First Submission To SC

[4] On 31 July 2015, CLIQ *via* MIB sent their first submission dated 31 July 2015 to SC for the proposed acquisition of the Kazakhstan asset.

[5] SC raised several queries on the proposed acquisition of the Kazakhstan asset after receipt of the first submission.

The Second Submission

[6] On 14 December 2015, CLIQ *via* MIB submitted a revised submission ("second submission").

[7] SC still had concerns and sought clarifications from MIB on various matters, including the technical information and data relied on relating to the Kazakhstan asset.

[8] MIB issued a letter dated 7 January 2016 to CLIQ advising them on the steps they should take in regard on their submission on the proposed acquisition of the Kazakhstan asset ("MIB letter").

[9] The applicants contended that the context of the letter dated 7 January 2016 reveals that MIB was communicating the instructions of SC to the applicants on the following:

(i) 2P reserves estimate

> The SC has further queried on whether the 2P Reserve Estimates comply with the guidelines …;

(ii) Fairness report by Deloitte Corporate Advisory

> The SC has queried on whether Deloitte Corporate Advisory has reviewed AGR-TRACS Reserve Assessment Report and Revised Asset Valuation Report …;

[10] In response to SC's instructions, MIB specifically advised the Board of Directors of R2 on the specific steps to be undertaken, namely, *inter alia*, "to appoint Deloitte Corporate Advisory to update the fairness report after having reviewed the AGR reports and confirms that nothing has come to its attention and they are satisfied with all information provided to them including assumptions made in the AGR reports."

A **SC's Objection**

[11] Learned counsel for SC raised his objection to the applicants' application under three headings:

(i) The decision complained of is not a decision;

B (ii) The applicants have no *locus* to file the application; and

(iii) Domestic remedy has not been exhausted.

Whether The Letter Dated 7 January 2016 Is SC's Decision

C **[12]** It was contended for SC that the decision complained of by the applicants *vide* MIB's letter dated 7 January 2016 is not a "decision" by the SC and hence it is not amenable to judicial review. In support of SC's contention, learned counsel relied on the following grounds:

(i) MIB's letter was not issued by SC; and

D (ii) On the plain reading of the MIB letter, it was merely MIB's advice to CLIQ on the steps they should take in regard to their submission on the proposed acquisition of the Kazakhstan asset.

[13] In support of SC's objection, learned counsel for SC referred me to a number of authorities:

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(i) In *Mohd Karim Abas & Ors v. Ketua Pengarah Jabatan Hal Ehwal Kesatuan Sekerja* [2013] 1 LNS 280; [2013] 4 MLJ 420, the Court of Appeal affirmed the High Court's decision refusing leave to apply for judicial review. The main issue in that case was whether the letter from the relevant authority (stating that the decision to register the union as an in-house union is to be deferred) amounted to a decision that was amenable to judicial review. The Court of Appeal held:

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> The court's themselves have placed various restrictions to control exodus of complaints against public bodies by busy bodies and alike, or where the complaint is premature or trivial or misconceived as in the instant case … The instant case is one which will fall within jurisprudence of frivolous, vexatious and abuse of process of court, for in the instant case (i) no decision has been made; (ii) the applicants have not demonstrated in the affidavit of the prejudice for failure to have the decision made promptly; (iii) no reason given why appeal mechanism provided under the Act has not been complied with.

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(ii) In *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865, the Federal Court held:

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> It is widely accepted that not every decision made by an authoritative body is suitable for judicial review. To qualify there must be a sufficient public law element in the decision made. For this, it is necessary to examine both the source of the power and the nature of the decision made; whether the decision was made under a statutory power.

(iii) In *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805; [2008] 6 MLJ 704, the Court of Appeal held: A

> It is thus crucial to first identify definitely what the decision is that is sought to be impugned. This has to be the actual date (see *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1). The appellants' interpretation towards the first respondent's non-response to their letter makes no sense and far stretching one's imagination. This would give rise to an artificial meaning to the word decision. The date of the decision too becomes fictitious which makes the computation of the statutory time limit under O. 53 of the RHC indeterminable. B C

(iv) In *M & W Zander (M) Sdn Bhd v. Director General of Inland Revenue* [2005] 6 CLJ 336, the High Court held:

> I must at once say that I do not agree with these arguments. With reference to Mr. Lau's first, second and third arguments which concern a matter of interpretation, I agree with him that O. 53 should not be read in such a way as to deprive it of its vitality and flexibility as a remedy, but on the facts of this case it would be wrong to give the word 'decision', such a tortured or artificial meaning just so that a factual situation which clearly cannot, by any stretch of the imagination, be described as a decision, is in fact regarded as one. The court would clearly be in danger of doing just that here if it accedes to Mr. Lau's contention that a mere indication by officers to the Inland Revenue Board as to how they compute the applicant's chargeable income constitutes a decision in the sense of an assessment made by the Director General of the tax payable by the applicant. D E F
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> …
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> For the reasons above, I agree with learned Senior Federal Counsel that in the absence of a decision by the Director General, the applicant not only lacks a sufficient interest or *locus standi* to make this application, but that its application is premature in the circumstances. G
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> …
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> Far from being a mere technicality, the requirement for there to be a decision or at the very least a sub-decision of some sort or the lack of it, or of an existing right or status of some sort which is being denied or threatened, is a matter that goes to the very foundation or basis of the application for judicial review under O. 53 and so cannot be considered as a mere technicality. H

[14] It is not a disputed fact that MIB is the principal advisor of CLIQ and all communication between the applicants and SC were made through MIB in such capacity. The documentary evidence clearly shows that SC does not deal directly with the applicants but communicated at all material times through MIB as principal advisor as can be seen from the following evidence: I

(i) The context of the letter dated 7 January 2016 reveals that MIB was communicating the instructions of SC to the applicants, on the following:

(a) 2P reserves estimate

The SC has further queried on whether the 2P reserve estimates comply with the guidelines …;

(b) Fairness report by Deloitte Corporate Advisory

The SC has queried on whether Deloitte Corporate Advisory has reviewed AGR-TRACS reserve assessment report and revised asset valuation report …;

(ii) In response to SC's instructions, MIB specifically advised the Board of Directors of R2 on the specific steps to be undertaken, namely, *inter alia*, "to appoint Deloitte Corporate Advisory to update the fairness report after having reviewed the AGR reports and confirms that nothing has come to its attention and they are satisfied with all information provided to them including assumptions made in the AGR reports.

(iii) MIB, at all material times, carried the instructions of SC to the applicants as evidenced by:

(a) In the letter dated 15 January 2016, MIB which states that "In connection therewith, we wish to advise the Board of Directors of CLIQ, that at the meeting, the SC has advised that the application is deemed incomplete in view of the information which has yet to be submitted to the SC … .

(b) In the letter dated 15 January 2016, MIB stated "in addition, the SC also reiterated that the deadline to submit the abovementioned information remains as 22 January 2016 …";

(c) In the email dated 19 January 2016, MIB informed Deloitte that SC still insisted on Deloitte's completion of an independent technical Assessment of AGR-TRACS' reports before giving a negative assurance to R1, if at all; and

(d) In response to R2's email to Deloitte dated 20 January 2016, of which MIB was sent a copy, MIB stated that "we wish to highlight that during our meeting with the SC together with Skrine on 15 January 2016 it was reiterated that the updated fairness report should include an independent technical review by Deloitte of the AGR reports".

(iv) In an email from SC dated 26 January 2016, SC responded to a letter dated 23 January 2016 and an email dated 25 January 2016 sent directly by the applicants to SC appealing, *inter alia,* for SC to accept the second application (14 December 2015 application) because there was difficulty, in a short period of time, for Deloitte to produce the

independent technical report as requested by SC. SC stated that the applicants must communicate through their principal advisors, namely MIB.

[15] Hence, I accept the applicants' submission that the fact that the letter dated 7 January 2016 was not a letter from SC is of no relevance because SC's instructions and/or queries are carried through, at all material times, to the applicants through MIB as the principal advisor.

Whether The Letter Dated 7 January 2016 Amounts To A Decision

[16] It was further submitted for SC that the MIB letter was merely MIB's advice to CLIQ and is not a decision. On the contrary, learned counsel for the applicants submitted that whether any decision has been made that is susceptible to judicial review must be seen in the context of the whole case as pleaded. In support of his contention, learned counsel relied on the case of *Wee Choo Keong v. Ketua Pengarah Perkhidmatan Awam Malaysia* [2011] 3 CLJ 331; [2010] MLJU 1097 and *R (on the application of Lambeth LBC) v. Secretary of State for Work and Pensions* [2005] EWHC 637.

[17] Learned counsel for the applicants further submitted that if this court were to find that the letter dated 7 January 2016 was an informal expression of query, it became later a 'decision' that is susceptible to judicial review.

[18] In support of his contention, learned counsel for the applicants relied on the following opinion in *De Smith's Judicial Review*, 6th edn (pp. 122-123):

> First, there are situations where a public authority seeks to deal with a problem by informal action outside the expected statutory procedures or in the absence of any statutory regime. It is submitted that where a public authority takes such action to further its public functions, this should, in principle, be reviewable.

[19] I consider that the approach adopted by learned counsel for the applicants in relation to the meaning of 'decision' is correct in the context of this case for the following reasons.

[20] In the letter dated 7 January 2016, MIB stated that "the SC has queried on whether Deloitte Corporate Advisory has reviewed AGR-TRACS' reserve assessment report and revised asset valuation report to ensure full compliance with the requirement as set out in item (4), Part F, Appendix 10(b) of the Main Market Listing requirements of BURSA Malaysia Securities Berhad. It was mentioned during the SC discussions that the opinion set out in the fairness report should be, *inter alia,* without qualification and that Deloitte Corporate Advisory is satisfied with all information provided including assumptions made in the AGR reports."

[21] The minutes of the meeting held on 15 January 2016, prepared by SC and R2, *inter alia*, states the following:

(a) The objective of the meeting is "to seek clarification from the SC on their request for the update fairness report in relation to submission of application for QA …";

(b) Deloitte specifically informed R1 that they were unable to "update the fairness report by 22 January 2016 and had subsequently told CLIQ (R2) that they will not be updating the fairness report.";

(c) "JC (MIB) asked whether the SC could extend the submission deadline of 22 January 2016 to a later date as Deloitte had said that they are unable to update the fairness report by 22 January 2016 …";

(d) R1 was prepared to "accept a 'negative assurance' in respect of the fairness report …"; and

(e) States that by 'negative assurance', SC meant "Deloitte can state in its fairness report that although they have relied on AGR's Reports, nothing has come to our attention that causes us to believe that the AGR's reports are inaccurate."

[22] Further, in a letter dated 15 January 2016, MIB informed R2 that "in connection therewith, we wish to advise the Board of Directors of CLIQ, that at the meeting, SC has advised that the application is deemed incomplete in view of the information which has yet to be submitted to SC as we have already highlighted in the letters as follows:

(i) The updated AGR reports;

(ii) The reply to SC's queries; and

(iii) The updated revised fairness report.

[23] In the same letter, MIB further states that "in addition, the SC also reiterated that the deadline to submit the abovementioned information remains as 22 January 2016".

[24] I agreed with the submission of learned counsel for the applicants that the email dated 20 January 2016 makes it clear that the meaning of 'negative assurance' discussed in the meeting held on 15 January 2016 is a requirement that Deloitte has to undertake an independent technical review of the AGR reports. The independent technical review by Deloitte over the reports of AGR surfaced for the first time in the letter dated 7 January 2016 from MIB, in the form of a query from SC whether Deloitte has undertaken such a review.

[25] Therefore, based on the facts of this case, in my view, there was a 'decision' by SC *vide* MIB's letter dated 7 January 2016 for Deloitte to produce an independent technical assessment of AGR's reports.

No Locus Standi

[26] It is SC's case that the applicants have no *locus standi* in this matter as they are not shareholders in R2 and therefore have no legal interest. In support of this contention, SC has relied on *Semantan Estate (1952) Sdn Bhd v. Collector of Land Revenue Wilayah Persekutuan* [1987] 2 CLJ 199; [1987] CLJ (Rep) 329; [1987] 2 MLJ 346.

[27] SC further contends that in any case, a financial interest is not sufficient to establish *locus standi*. They relied on the case of *Kerajaan Negeri Selangor & Ors v. Pendaftar Pertubuhan Malaysia & Another Case* [2011] 1 LNS 1638; [2012] 3 MLJ 795.

[28] However, in the decision in *Malaysian Trade Union Congress & Ors v. Menteri Tenaga Air dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 3 MLJ 145, the Federal Court had reviewed the true test of *locus standi* in judicial review proceedings under O. 53. The Federal Court held that the test propounded in *Lim Kit Siang* and *Othman Saat (supra)* is not applicable to an application for judicial review under O. 53. The test is whether a person is 'adversely affected'. This is what the Federal Court said:

> In order for an Applicant to pass the 'adversely affected' test, the Applicant had to show he had a real and genuine interest in the subject matter which was different from the 'sufficient interest' test applied to English cases under the English Supreme Court Rules.

[29] Having rejected the test propounded in *Lim Kit Siang (supra)* that a legal right must be affected before there can be a standing in a judicial review, the Federal Court stated the test as follows:

> In our view, for an Applicant to pass the 'adversely affected test', the Applicant has to at least show he has a real and genuine interest in the subject matter. It is not necessary for the Applicant to establish infringement of a private right or the suffering of special damage.

[30] In gist, the applicants have pleaded that SC's decision has had a severe impact on:

(a) The investments made by the public in R2 and the expectation of the investing public on the acquisition of the qualifying asset and thus the profits to be made;

(b) The value of the investment in terms of warrants held by members of the public which are now potentially reduced to zero;

(c) The diminution in the value of shares held by members of the public in R2 due to the return of 90% only of their investment upon liquidation (10% wasted costs to acquire the qualifying asset); and

(d) The wasted costs of the IPO and the effort to acquire the qualifying asset in terms of the investments made by private persons and the applicants.

[31] In the light of the above authorities and applying it to the facts of this present case, in my view, the applicants have the *locus standi* to bring this proceeding against SC on the ground that they have a direct financial interest as shareholders of Best Oracle, who in turn hold 20% of shares in R2.

Domestic Remedy Was Not Exhausted

[32] This brings me to the final issue in this case.

[33] It was contended for SC that in essence, SC has argued that the appeal mechanism provided under s. 364 of the Capital Markets and Services Act 2007 (Act 671) has not been availed by the applicants.

[34] On this point, it was submitted for the applicants that the applicants and R2 have availed themselves of an appeal to SC to reconsider its position with respect to (i) the 2P reserves issues and ii) the requirement of Deloitte's independent technical assessment of AGR's reports based on the following grounds:

(a) In an email dated 20 January 2016, R2 informed Deloitte, a copy of which was emailed to MIB, that a 'negative assurance' means that there was no requirement for Deloitte to undertake an independent technical assessment of AGR reports. MIB, in the email dated 20 January 2016, presents SC's position and states clearly the meaning of 'negative assurance'. SC effectively rejected the applicants' appeal to reconsider their decision made *vide* the letter dated 7 January 2016;

(b) In an email from R1 dated 26 January 2016, SC responding to a letter dated 23 January 2016 and an email dated 25 January 2016 sent directly by the applicants to SC appealing, *inter alia,* for SC to accept the second application (14 December 2015 application) because there was difficulty, in a short period of time, for Deloitte to produce the independent technical report as requested by SC, stated that the applicants must communicate through their principal advisors, namely MIB. This was SC's second rejection of the applicants' appeal to reconsider the decision made *vide* letter dated 7 January 2016; and

(c) In a letter dated 15 February 2016, R2 requested an extension of time of at least three months starting from 10 April 2016. However, in a letter dated 24 February 2016, SC responded by stating that the equity guidelines, investors expectations, R2's statement of accounts expiring on 31 March 2015, the auditor's report, and the 'regulatory certainty' all required R2 to complete the acquisition of the qualifying asset by 9 April 2016. This amounts to the third and final rejection of R2's request to SC for a reconsideration of the decision made *vide* letter dated 7 January 2016.

[35] It is noted that s. 364 of Act 671 provides as follows: A

364. Application by aggrieved person for review

The Commission may review its own decision under this Act upon an application made by any person who is aggrieved by such decision.

[36] Section 2 of Act 671 defines Commission as follows: B

means the Securities Commission Malaysia established under the Securities Commission Malaysia Act 1993.

[37] Section 3 of the Securities Commission Malaysia Act 1993 (Act 498) established the Commission. Section 4 of Act provides that the membership of the Commission are as follows: C

Board of Commission

4(1) There shall be a Board of the Commission.

(2) The Board shall consist of the following members who shall be appointed by the Minister: D

(a) a Chairman;

(b) a Deputy Chief Executive; and

(c) seven other members, who may include persons representing the government and private sector. E

(3) The Board shall:

(a) be responsible for monitoring the overall governance of the Commission;

(b) be responsible for reviewing and approving the strategic plan and budget of the Commission; F

(c) be responsible for reviewing and adopting appropriate systems and controls to manage the enterprise risks of the Commission;

(d) have oversight of the affairs and business of the Commission and keep under constant review the performance of the Commission in giving effect to its objects, carrying out its functions and the use of the financial resources of the Commission; and G

(e) be responsible for such other matters as may be provided under the securities laws. H

[38] Based on the facts of this case, I am satisfied that the appeal (review) mechanism under s. 364 of Act 671 has not been availed by the applicants. In fact, the applicants have not provided any reason why it has not resorted to the statutory mechanism under s. 364. I

[39] The Court of Appeal in the case of *Mohd Karim Abas & Ors v. Ketua Pengarah Jabatan Hal Ehwal Kesatuan Sekerja* [2013] 1 LNS 280; [2013] 4 MLJ 429 held as follows:

> The courts themselves have placed various restrictions to control exodus of complaints against public bodies by busy bodies and alike, or where the complaint is premature or trivial or misconceived as in the instant case. The development of the law in this area of jurisprudence will clearly show that the goal post for obtaining the relief has often been molded from time to time and is not seen as a static concept. If judicial fetters are employed, it is only for the purpose of stopping busy bodies or premature claims, who ultimately cannot be given any form of relief and from disturbing the courts and the workings of the government and public bodies.

[40] In *Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd* [2002] 3 CLJ 624; [2002] 2 MLJ 707, the Court of Appeal held:

> If the respondent has any complaints, then it is required to be addressed on an application for judicial review. And the proper time at which this should be done is after the exhaustion of the statutory appellate procedure.

[41] In my view, based on the facts of that case, the proper time at which the applicants should seek to apply for judicial review is after the exhaustion of the statutory review procedure in pursuant to s. 364 of Act 671.

Conclusion

[42] Based on the above reasons, this application is dismissed.